Supreme Court, U.S.
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No. 99-950

In The

Supreme Court of the United States

CONSOLIDATED RAIL CORPORATION,

Petitioner,

v.

DARLENE M. WIGHTMAN, Administratrix of the Estate of MICHELLE L. WIGHTMAN, Deceased; MICHELLE WIGHTMAN CHARITABLE FOUNDATION,

Respondents.

On A Petition For A Writ Of Certiorari To The Supreme Court Of Ohio

PETITIONER'S REPLY BRIEF

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DESIGNATION OF CORPORATE RELATIONSHIPS

The Designation of Corporate Relationships set forth at page ii of Petitioner's petition for a writ of *certiorari* is incorporated by reference herein.

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PETITIONER'S REPLY BRIEF

Respondents' brief in opposition ("Opp.") to Consolidated Rail Corporation's ("Conrail") petition for a writ of *certiorari* fails to confront the fundamental argument at the heart of that petition: that the Due Process Clause of the Fourteenth Amendment is violated when a state imposes a $15,000,000 punitive damages award where there exists a substantial possibility of judicial bias by the state's highest court – which affirmed the award without addressing this serious issue – and where the state courts deprived defendant of a full and fair opportunity to present its defense to that award. Moreover, nothing in the opposition refutes Petitioner's arguments that the significant due process issues raised deserve this Court's attention to ensure that litigants in both state and federal court receive a full and fair opportunity to defend against – and seek review of – the imposition of substantial punitive damages awards, and that the imposition of such awards be rational, foreseeable and consistent.

Rather, the brief in opposition: (1) simply repeats the flawed analysis of the Ohio Supreme Court, in which that court misapplied *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996); (2) does not even attempt to defend the state court's exclusion of critical evidence – evidence that led a prior jury to determine that the victim was 40% responsible for the accident and a prior judge to conclude that no punitive damages were due; and (3) erects irrelevant and erroneous arguments in its attempt to evade this Court's review of the serious due process issues raised in the petition.

ARGUMENT IN REPLY

I. PETITIONER PROPERLY RAISED IN THE OHIO STATE COURTS THE CLAIM THAT ITS DUE PROCESS RIGHTS WERE VIOLATED BY THE IMPOSITION OF AN EXCESSIVE PUNITIVE DAMAGES AWARD THROUGH A FUNDAMENTALLY FLAWED PROCESS.

Prior to visiting the merits of Respondents' arguments in opposition to the central due process issues raised by this petition, we consider briefly the procedural challenges Respondents advance. Specifically, Respondents' argument that, "Petitioner did not raise a due process issue below regarding the campaign contributions to Justices Pfeifer and Sweeney," Opp. at 17, is factually incorrect and legally misleading. First, Conrail's petition expressly poses the question whether the Due Process Clause is violated by the imposition of the punitive damages award after a process that was fundamentally flawed – a claim indisputably raised in the Ohio courts – and asserts several arguments in support of that claim, each of which (including the campaign contribution issue) was raised before the Ohio Supreme Court.

Conrail's first Question Presented seeks review of the *claim* it repeatedly pressed before the Ohio trial and appellate courts: that imposition of a substantial punitive damages award following a fundamentally flawed process violated its right to due process. Contrary to Respondents' suggestion, the *argument* that this unconstitutional award was affirmed by a state supreme court tainted by potential judicial bias – as well as that court's refusal to address this issue – is properly before this Court.

As this Court recently made clear:

> Once a federal *claim* is properly presented, a party can make any *argument* in support of that claim; parties are not limited to the precise arguments they made below. . . .
>
> A litigant seeking review in this Court of a claim properly raised in the lower courts thus generally possesses the ability to frame the question to be decided in any way he chooses, without being limited to the manner in which the question was framed below.

Yee v. City of Escondido, 503 U.S. 519, 534-35 (1992) (emphasis added); *cf. Adams v. Robertson*, 117 S. Ct. 1028, 1031 (1997) (per curiam) (dismissing writ of *certiorari* as improvidently granted when the "broader federal claim" raised in the *certiorari* petition – that approval of a class action settlement violated the Due Process Clause – was not raised before the state court); *Illinois v. Gates*, 462 U.S. 213, 219-20 (1983) (noting that two issues, one raised below and the other not, might be "so connected" that both are properly presented in a *certiorari* petition and should be treated by the Court as simply two related grounds "for alleging the invalidity of the [lower court's] judgment" (quoting *Dewey v. Des Moines*, 173 U.S. 193, 197-98 (1899)) (alteration in original)).[1]

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[1] Respondents' argument, *see* Opp. at 20-22, that this Court should not consider Petitioner's judicial bias argument because Conrail did not follow the proper state procedure for raising this issue is unavailing. This is essentially an "independent and adequate state grounds" objection to the *certiorari* petition. For a state court's decision to rest on independent and adequate state grounds precluding review by this Court, such grounds must be "clear from the face of the opinion." *Michigan v. Long*, 463 U.S. 1032, 1041 (1983). Yet, the Ohio Supreme Court did not deny

Moreover, to the extent that Conrail's due process arguments in this Court involve the Ohio Supreme Court's utter refusal even to consider Conrail's recusal motion, this Court is the only forum in which Petitioner possibly could advance these arguments. The procedural posture of this case is thus similar to *Wood v. Georgia*, 450 U.S. 261 (1981), in which this Court reached a due process argument that was not expressly raised in the state courts but was inextricably connected to the procedural history of the case. The petitioners in *Wood*, who were convicted of distributing obscene materials, failed to make certain court-ordered payments and their probation was revoked. In the state courts, they challenged the revocations on equal protection – but not on due process – grounds. The Court viewed as a potential unconstitutional conflict of interest the fact that the petitioners had been represented throughout the state proceedings by an attorney chosen and paid for by their employer and noted that "[t]he party who argued the appeal and prepared the petition for certiorari was the lawyer on whom the conflict-of-interest charge focused," making it unlikely that the issue would be raised below. *Id.* at 265 n.5. Eight members of the Court endorsed the majority's

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Conrail's recusal motion on the ground that it was untimely or procedurally defective, let alone do so clearly, as required by *Long*. In fact, it did not rule on the motion at all.

In any event, Conrail's recusal motion was procedurally proper and timely, coming as it did shortly after the final campaign reports for 1998 were filed and before any decision had been rendered in the appeal to the state supreme court. *See* Pet. App. 76a-77a; *cf. Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 819 (1986) (finding that the Court had jurisdiction despite petitioner's failure to raise the recusal issue until *after* the state supreme court had issued its decision).

statement that, "[w]here, as here, a possible due process violation is apparent on the particular facts of a case, we are empowered to consider the due process issue." *Id.* at 264-65.

As in *Wood*, the procedural history of this case is closely related to the due process claim, given the Ohio Supreme Court's refusal to address Petitioner's judicial bias argument. This inaction by the state court denied Conrail due process of law and left it with no recourse but to present its allegations of judicial bias to this Court. In short, Respondents' efforts to avoid this Court's review of the serious constitutional questions raised by this case should be rejected.

Finally, in arguing that a constitutionally required fair tribunal exists as long as an adjudicator does not have a "direct interest in the outcome" of a case, Opp. at 18, Respondents miss the central point of Conrail's due process argument. The substantial campaign contributions to two of the Ohio Supreme Court's seven justices raised the possibility that they might not "hold the balance nice, clear, and true." *Tumey v. Ohio*, 273 U.S. 510, 532 (1927); *cf. Nixon v. Shrink Mo. Gov't PAC*, No. 98-963, slip op. at 10 (U.S. Jan. 24, 2000) ("[T]he perception of corruption inherent in a regime of large individual financial contributions to candidates for public office [is] a source of concern almost equal to *quid pro quo* improbity." (citation and internal quotation omitted)). When the court nonetheless affirmed the questionable punitive damages award without even acting on Conrail's recusal motion, Conrail was denied its right to due process of law, including full, fair, "meaningful and adequate" review of a punitive damages award. *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 20 (1991).

In any event, the resulting harm is clear. Petitioner appealed to the Ohio Supreme Court because it believed that the judgment of the lower court had violated its due process rights. The Ohio Supreme Court, with one of the justices who had received the substantial campaign contributions authoring the opinion, rejected Petitioner's contentions, and then added millions of dollars in post-judgment interest on the punitive award, a first in Ohio jurisprudence. It is small consolation to Conrail that, as Respondents emphasize, the state supreme court did not reinstate the remitted portion of the punitive damages award. *See* Opp. at 20. Moreover, the two justices' votes on the remittitur issue are irrelevant to the underlying due process issue, as their participation in the court's deliberation and decision while their impartiality was in question "was sufficient in itself to impugn the decision." *Lavoie*, 475 U.S. at 830-31 (Brennan, J., concurring).

II. RESPONDENTS ARE UNABLE TO DEFEND THE OHIO STATE COURT'S EXCLUSION OF DEFENDANT'S CRITICAL EVIDENCE WITH RESPECT TO THE CIRCUMSTANCES OF THE ACCIDENT.

In its petition, Conrail showed that it had been denied its basic due process right of being permitted to introduce significant relevant evidence in its own defense prior to the imposition of the $15,000,000 punitive award. In response, rather than attempting to defend the state courts' denial of Conrail's rights, Respondents resort to rearguing factual points that the state courts already rejected. Specifically, in a desperate attempt to avoid the unconstitutional effect of the trial court's rulings, Respondents argue, at this late stage, that the trial court did not

prevent Conrail from presenting its evidence regarding the facts and circumstances surrounding the collision. *See* Opp. at 14-16.

But, it is clear that the trial court, in a decision later ratified by the state's appellate courts, in fact did exclude Conrail's evidence that would have provided a complete and fair picture of the cause of the accident and of the factors outside of Conrail's control that increased the likelihood of the accident occurring. Pet. App. 5a; 38a; 69a-70a.[2] Indeed, while ruling that the exclusion of Conrail's evidence was permissible, none of the Ohio courts ever questioned the threshold point Respondents now press: whether Conrail's evidence had been excluded in the first place. Respondents' choice to reargue stale factual issues rather than respond to Conrail's substantive arguments is telling.

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[2] The Supreme Court of Ohio accepted the fact that Conrail's proffered evidence had been rejected: "The trial court prohibited Conrail from introducing evidence it had introduced at the first trial regarding certain circumstances surrounding the accident. . . . The court granted plaintiffs' motions *in limine* regarding evidence of Michelle Wightman's .039 percent blood-alcohol level. . . . The court also granted plaintiffs' motion *in limine* regarding the testimony from a Conrail expert regarding the effect that alcohol and a driver's age might have in a railroad-crossing collision." Pet. App. 5a.

III. RESPONDENTS FAIL TO REFUTE PETITIONER'S ARGUMENT THAT THE PUNITIVE DAMAGES AWARD IN THIS CASE IS CONSTITUTIONALLY EXCESSIVE AND CONTRIBUTES TO A SPLIT IN AUTHORITY OVER THE PROPER PROPORTIONALITY ANALYSIS UNDER *BMW V. GORE*.

In Respondents' effort to obscure the inconsistent manner in which lower federal and state courts have implemented the *Gore* proportionality analysis, they misstate the law of Idaho regarding punitive damages. *See* Opp. at 12. In its petition, Conrail correctly identified Idaho as one of the minority of jurisdictions that has looked to all compensatory damages in a case – even those for claims not subject to punitive damages – when determining whether punitive damages exceed constitutional proportions. *See Walston v. Monumental Life Ins. Co.*, 923 P.2d 456 (Idaho 1996). In *Walston*, the court analyzed the proportionality between *all* compensatory damages (including those for a contract claim) and the punitive damages, *see id.* at 468, although punitives were not awarded for the contract claim but only for two tort claims, *see id.* at 459-60. Therefore, Respondents' attempt to hide the confusion and inconsistency that plagues the lower federal and state courts that must undertake the *Gore* proportionality analysis is unsupported by its misleading references to Idaho law.

Respondents' superficial defense of the Ohio Supreme Court's own superficial *Gore* analysis is similarly telling. Respondents devote but a single paragraph to the heart of Conrail's argument on this point – the *Gore* proportionality factor – and even then, by merely echoing the Ohio court's conclusion ("the ratio between compensatory and punitive damages [is] less relevant here

because of the egregiousness of the act," Opp. at 9), confirm that the state court disregarded this critical factor. And, Respondents simply repeat the court's *ipse dixit* that, under *Gore's* third guidepost, a $15,000,000 punitive damages award for $2,400 of property damages is comparable to the civil and criminal penalties that could be imposed for similar conduct. There is no support for these propositions in either this Court's precedents or the factual record of this case. Moreover, contrary to Respondents' assertion, Petitioner does not seek to impose a "mindless . . . mathematical litmus test" on state courts. Opp. at 14. Rather, it seeks only a proper adherence to the *Gore* framework and consistency in the application of its guideposts to ensure that the due process principles established by this Court are afforded to all litigants in state and federal courts.

CONCLUSION

The problem posed in this case is not isolated, as revealed by the *amicus* briefs. Interstate operations like railroads repeatedly are subjected to enormous damage awards that are the product of flawed judicial processes. For example, campaign contributions by local lawyers and their affiliates to judges who have cases pending before them raise a fundamental due process issue that arises often and creates a continuing perception, not only by the public but also by the bar, that the judicial process is not even-handed. This Court just last month recognized the perception problems posed by substantial contributions to a political campaign in *Nixon v. Shrink Missouri Government PAC*. That problem pales by comparison to the issues created when jurists hearing a dispute are the beneficiaries of direct and multiple contributions from

the lawyers on one side of a case, especially when those contributions are made after an appeal has been filed, and where the court does not assure the litigants that it can even-handedly resolve the case, even after the matter is brought to its attention. Respondents do not remotely suggest that this is not a significant problem. Instead, they argue that the contributions do not rise to the level of a due process violation. That contention merely begs the question whether the Court should decide the issue. And, the answer to that question is clear: yes.

For the foregoing reasons and for the reasons set forth in the petition for a writ of *certiorari*, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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